NO. P19-384 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,	)	
Plaintiff-Appellee,	)	From Wake County
	)	18 CVS 9806
v.	)	
TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity,	)	
Defendant-Appellants.	)	

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PLAINTIFF-APPELLEE BRIEF

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ISSUE PRESENTED

Did the Superior Court correctly rule that a North Carolina General Assembly that was the product of a widespread unconstitutional racial gerrymander, and which therefore did not represent the people of North Carolina, exceed its authority when it placed constitutional amendments on the ballot?

INTRODUCTION

Illegal actions have consequences. That was the straightforward conclusion reached by the trial court below and that is the decision this Court should uphold. When Defendants drew illegal maps that racially segregated voters and diminished the political voice of African Americans, they forfeited their claim to popular sovereignty. The court below was right to conclude that Defendants could not use their ill-gotten supermajority to change the Constitution.

While this case presents a novel question regarding limits of power accorded an unconstitutional legislature, the source for the answer is an old one: "[A]ll government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2.

For as long as our Constitution has included a provision for amendment, it has required a strict two-step process. Before an amendment can be placed before the people for ratification, both houses of the General Assembly must achieve a three-fifths consensus. The process is difficult by design. Constitutional change should require a broad base of support because a constitution is meant to endure for generations and serve "people of fundamentally differing views." *Lochner v. New York,* 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

This Court is presented with a question of first impression because of the unprecedented actions of Defendants. Defendants knew that their supermajority was obtained by illegal means—the Supreme Court so ruled in June 2017. Defendants knew that their power to act under State law may be limited—they were so warned by a federal three-judge panel. Nevertheless, Defendants, without regard for the law or the people they serve, attempted to rewrite our state's most foundational document.

In their brief, Defendants rely on inapposite case law, alarmism, and misinterpretation of state law. They fail to confront the straightforward language of our Constitution, which makes clear that it

may only be altered by a supermajority that lays claim to popular sovereignty.

This Court should affirm the trial court's ruling.

STATEMENT OF THE CASE

The North Carolina State Conference of the NAACP ("NC NAACP") [1] filed this matter in Wake County Superior Court on August 6, 2018, challenging four proposed constitutional amendments on two separate bases. R. at 7-8. First, that the General Assembly lacked the authority to place constitutional amendments on the ballot, pursuant to N.C. Const. art. I, §§ 2, 3, 35 and art. XIII, § 4; and second, that the language used to present the amendments to the people was vague, misleading, and incomplete in violation of N.C. Const. art. XIII, § 4. R.

[1] In its amicus brief in support of Defendants, the amicus curiae NC Values Coalition raises a question as to NC NAACP's standing, a settled issue in this case that Defendants themselves do not contest. NC NAACP has established organizational and associational standing. *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 557, 809 S.E.2d 558, 561 (2018) (citing *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d. 538, 555 (1990)). Moreover, the three-judge panel that presided over the preliminary injunction phase of this case denied Defendants' attempt to contest NC NAACP's standing, a ruling that Defendants did not take up again on summary judgment and did not take up on appeal before this Court. *Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte*, 289 N.C. 620, 632, 224 S.E.2d 580, 588 (1976) (under Rule 28 of the North Carolina Rules of Appellate Procedure, the issues considered on appeal are limited to those raised by the parties in their briefs, not those briefed only by an amicus curiae). Should this Court, however, wish to take up this issue in its review, the NC NAACP respectfully requests an opportunity to provide supplemental briefing.

at 9-10. Those four proposed amendments were Session Laws 2018-128 (the "Voter ID Amendment"); 2018-119 (the "Tax Cap Amendment"); 2018-117 (the "Boards and Commissions Amendment"); and 2018-118 (the "Judicial Vacancies Amendment"). R. at 27-30. The case was referred to a three-judge panel of the Superior Court. R. at 84.

After initial briefing and hearings on a motion for Preliminary Injunction and Temporary Restraining Order, the three-judge panel of the Superior Court ruled in favor of the NC NAACP in part, ordering that the Boards and Commissions and Judicial Vacancies proposed amendments be removed from the ballot because the ballot questions were vague, misleading, and incomplete in violation of the North Carolina Constitution.[2] R. at 112-13.

In its preliminary injunction order, the three-judge panel rejected Defendants' assertion that the issue of misleading and incomplete ballot questions was a non-justiciable, political question. *Id.* The three-judge panel also ruled, however, that it did not have jurisdiction over the NC

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[2] A similar challenge to two of the proposed constitutional amendments, the Boards and Commissions and Judicial Vacancies Amendments, was filed the same day by Governor Roy Cooper. *Cooper v. Berger*, 18 CVS 9805 (Wake County Sup. Court Aug. 6, 2018). The two cases were consolidated for purposes of a preliminary injunction ruling only. The Governor's case has since been closed.

NAACP's claim, which is currently before this Court, that the General Assembly lacked the authority to place amendments on the ballot. *Id.* Following that Order, the General Assembly rewrote the ballot questions for both the Boards and Commissions and Judicial Vacancies proposed amendments. After the revisions, those two proposed amendments were rejected by voters during the fall 2018 elections, and they are thus not at issue in this case. The Voter ID and Tax Cap proposed amendments were ratified by a simple majority.

The NC NAACP filed an amended complaint on September 19, 2018. R. at 121. On November 1, 2018, the NC NAACP moved for partial summary judgment on its claim that the General Assembly lacked the authority to put forward constitutional amendments once the United States Supreme Court entered a final decision upholding the finding that the General Assembly was the product of an extensive, unconstitutional racial gerrymander. R. at 154-56. In addition, the NC NAACP requested injunctive relief to enjoin the Voter ID and Tax Cap Amendments from taking effect. *Id.* On November 13, 2018, Defendants filed a motion to dismiss, and on January 3, 2019, filed a brief in support of that motion and in opposition to Plaintiff's motion for

partial summary judgment. After briefing and a hearing, on February 22, 2019, the Wake County Superior Court granted NC NAACP's request for partial summary judgment, rendering the Voter ID and Tax Cap Amendments, and their ensuing constitutional amendments, void. R. at 181-93.

Defendants filed their Notice of Appeal on February 25, 2019. R. at 194. Subsequently, Defendants filed a Motion for Temporary Stay and a Petition for Writ of Supersedeas in the Court of Appeals, which were granted on March 21, 2019. R. at 197. Defendants docketed their appeal on May 1, 2019. R. at 221.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Appellate review of the trial court's February 22, 2019 Order is appropriate under N.C. Gen. Stat. § 7A-27(b)(4) because N.C. Gen. Stat. § 1A-1, Rule 62(h) provides an immediate right of appeal where a declaratory judgment prevents or restrains enforcement of a statute.

Defendants are incorrect, however, to rely upon N.C. Gen. Stat. § 7A-27(b)(3)(c) and to characterize the February 22, 2019 Order as having discontinued the action because it rendered Plaintiff's other claim moot. Def. Br. at 5. The February 22, 2019 Order decided

Plaintiff's motion for Partial Summary Judgment on just one of their two claims. If the Order were reversed, Plaintiff's remaining claim would still be active and require review by the trial court.

STATEMENT OF FACTS

In June 2017, the United States Supreme Court issued a final ruling affirming that the North Carolina General Assembly was unlawfully constituted. *Covington v. North Carolina ("Covington I")*, 316 F.R.D. 117, 117 (M.D.N.C. 2016), *aff'd,* 137 S. Ct. 2211 (2017) (per curiam). Following the 2010 decennial census, legislative leaders manufactured a widespread racial gerrymander, illegally relying on race as the predominant factor motivating the drawing of districts in violation of the Equal Protection Clause of the United States Constitution. *Id.*

The scope of the racial gerrymander was unprecedented. Because the General Assembly leadership concentrated African-American voters into 28 districts, surrounding districts were deprived of African-American voters and thus those districts also were unconstitutionally impacted by the gerrymander. *See Covington v. North Carolina ("Covington II")*, 270 F. Supp. 3d 881, 893 (M.D.N.C. 2017).

The gerrymander "impact[ed] nearly 70% of the House and Senate districts, touch[ed] over 75% of the state's counties, and encompass[ed] 83% of the State's population—nearly 8 million people." *Id.* at 892. Altogether almost two-thirds of all House and Senate districts were redrawn to create remedial maps. *See Covington I,* 316 F.R.D. at 128, 176*; Covington v. North Carolina* ("*Covington III*"), 283 F. Supp. 3d 410, 419–20 (M.D.N.C. 2018), *aff'd in part, rev'd in part*, 138 S. Ct. 2548 (2018).

In remedying this unconstitutional racial gerrymander, a three-judge federal court panel determined that immediate elections under remedial districts were necessary to restore popular sovereignty to our State. *Covington II*, 270 F. Supp. 3d at 902. The court reluctantly concluded, however, that it would do more harm than good to order special elections so close to the regularly-scheduled 2017 election cycle. *Id.* (declining to order special elections due to concerns that the "compressed and overlapping schedule such an election would entail is likely to confuse voters, raise barriers to participation, and depress turnout"). The three-judge court noted with disapproval that this new

reality had been brought about by the legislature's own procedural maneuverings to delay the drawing of remedial district maps. *Id.*

At the same time, the *Covington* court ruled that limits on an unconstitutionally-constituted legislature's authority in the period before new elections could be held remained an "unsettled question of state law." *Id.* at 901. The federal court concluded that this question was "more appropriately directed to North Carolina courts, the final arbiters of state law." *Id.*

Despite being aware of this unsettled question, in the final week of the last regular legislative session of the illegal supermajority, the leadership of the General Assembly passed legislation to place six amendments to the North Carolina Constitution before the voters. 2018 N.C. Sess. Laws 96; 110; 117; 118; 128; and 119. The two amendments at issue in this case, the Tax Cap Amendment (Session Law 2018-119) and the Voter ID Amendment (Session Law 2018-128), passed the three-fifths threshold by just one and two votes respectively. R. at 27-30. These two proposed amendments were placed on the November 2018 ballot and were ratified.

The November 2018 election also marked the first opportunity

since 2012 for North Carolinians to elect members of the General Assembly under remedial maps that addressed the unlawful racial gerrymander. After the seating of those elected in November 2018, a single political party no longer holds a three-fifths supermajority in either the North Carolina House or Senate. Prior to that, North Carolinians were governed for six years by an unconstitutional body that did not reflect the will of the people.

ARGUMENT

I. Defendants Lacked the Authority to Propose Constitutional Amendments.

The extreme circumstances that led to this case of first impression were caused by Defendants' unprecedented actions—a widespread unconstitutional racial gerrymander that deliberately packed African American voters into racially segregated voting districts to dilute their voice and to diminish their power. *Covington II*, 270 F. Supp. 3d at 884. The gerrymander was one of the "largest . . . ever encountered by a federal court," and infected more than two thirds of the legislative districts in our state. *Id*.

The federal courts concluded that it would only further harm popular sovereignty to impose immediate elections, but left open to the

North Carolina courts the question of how much power the illegal body could rightly exercise until remedial elections were held. *See Covington II*, 270 F. Supp. 3d at 901 ("We agree with Plaintiffs that the absence of a legislature legally empowered to act would pose a grave disruption to the ordinary processes of state government. . . . Given that this argument implicates an unsettled question of state law, [this] argument is more appropriately directed to North Carolina courts, the final arbiters of state law.").

The trial court looked to the North Carolina Constitution to answer this question. In its Declaration of Rights, the Constitution states that the people of North Carolina have "the *inherent, sole, and exclusive right of regulating the internal government . . . and of altering . . . their Constitution*." N.C. Const. art. I, § 3 (emphasis added); R. at 183-84. The Constitution then makes clear that its amendment requires that the state's duly elected officials must draft, debate, and vote *by a three-fifths majority* in both houses to place an amendment proposal on the ballot. *Id.* (citing N.C. Const. art. XIII, § 4).

Here, as the trial court recognized, there is no question that the General Assembly that placed the challenged amendments on the ballot

was an illegally-constituted body and not representative of the people of North Carolina. That question was decided by the United States Supreme Court in June 2017. R. at 193, citing *Covington v. North Carolina*, 581 U.S. ——, 137 S. Ct. 2211 (2017).

As the *Covington II* court explained, the unconstitutionally gerrymandered maps that Defendants used to come to power unlawfully segregated voters by race, "strik[ing] at the heart of the substantive rights and privileges guaranteed by our Constitution." *Covington II*, 270 F. Supp. 3d at 890. "[U]njustifiably drawing districts based on race," the court went on, "encourages representatives 'to believe that their primary obligation is to represent only the members of [a particular racial] group, rather than their constituency as a whole'"—a message that is "altogether antithetical to our system of representative democracy." *Id.* at 891 (alteration in original) (quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993)).

The result was that Defendants' unconstitutional racial gerrymander "interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General

Assembly accountable," *id.* at 897, and begat "legislators acting under a cloud of constitutional illegitimacy." *Id.* at 891.

These findings are all settled facts—facts North Carolina was forced to suffer through for six full years. The illegal racial gerrymander affected 117 districts in North Carolina, requiring that over two-thirds of the districts in both houses of the legislature be redrawn. The three-fifths supermajority votes that passed the challenged constitutional amendments did so by only *one or two votes.* R. at 184. There was thus a direct relationship between the sweeping racial gerrymander and the required supermajority. R. at 191. ("the unconstitutional racial gerrymander tainted the three-fifths majorities required by the state Constitution before an amendment proposal can be submitted to the people for a vote").

Because of these undisputed facts, at the time Defendants took action to amend the Constitution, they did not "represent the people of North Carolina" and were therefore acting without the popular sovereignty and essential supermajority the constitutional amendment process requires. *Id.* The trial court thus correctly concluded that the amendments were unconstitutional and void *ab initio*. R. at 192.

Defendants complain that "the trial court neither cited nor discussed State law" in support of its opinion, Def. Br. at 13, and that "there is no state law cited in the trial court's twelve page opinion." *Id.* at 28. But that is not true. The trial court's Order was based on our most fundamental state law—the North Carolina Constitution.

Under the North Carolina Constitution, "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. The trial court looked to these fundamental principles to uphold the longstanding decree that "[a]ll political power is vested in and derived from the people; all government of right originates from the people [and] is founded upon their will only." N.C. Const. art. I, § 2. The trial court expressly relied on the mandate in the North Carolina Constitution that it may only be amended via the people's will, R. at 192. (citing N.C. Const. art. I, § 3), as well as the provision that sets constitutional amendment apart from regular legislative acts—that there be a consensus three-fifths majority of all members of both houses to place an amendment proposal on the ballot. *Id*. (citing N.C. Const. art. XIII, § 4).

Moreover, North Carolina case law supports the trial court's decision. Because of the centrality of popular sovereignty to lawful governance, North Carolina courts have long held that a body lacks *de jure* authority to engage in official acts after a finding that it obtained office through illegitimate means.

The North Carolina Supreme Court explained the reasoning for this doctrine:

> The ascertainment of the popular will or desire of the electors, under the mere semblance of an election unauthorized by law, is wholly without legal force or effect, because such election has no legal sanction. In settled, well-regulated government, the voice of electors must be expressed and ascertained in an orderly way, prescribed by law. It is this that gives order, certainty, integrity of character, dignity, direction, and authority of government to the expression of the popular will. An election without the sanction of law expresses simply the voice of disorder, confusion, and revolution, however honestly expressed. Government cannot take notice of such voice until it shall in some lawful way take on the quality and character of lawful authority. This is essential to the integrity and authority of government.

Van Amringe v. Taylor, 108 N.C. 196, 12 S.E. 1006 (1891); *see also Starbuck v. Town of Havelock*, 252 N.C. 176 (1960) (discussing the limits of power of a municipal corporation created through an improper process); *Edwards v. Bd. of Educ. of Yancey Cty.*, 235 N.C. 345, 70

S.E.2d 170 (1952) (holding that school board members who were illegally holding dual offices were usurpers, and their acts totally invalid).

The only exception to this rule arises when the body acts under a public presumption of validity, in which case, its acts may be afforded retrospective *de facto* lawful authority. *See, e.g.*, *Van Amringe,* 108 N.C. at 198 (discussing the application of the *de facto* doctrine in North Carolina law); *see also Norton v. Shelby Cty.,* 118 U.S. 425, 441 (1886) (validity may be given to the acts of a "*de facto*" officer based on "considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby").

Here, after the United States Supreme Court made its final determination in *Covington* that the North Carolina legislative districts were the product of an unconstitutional racial gerrymander, the legislature ceased to have *de facto* validity and was thus limited in the actions it could lawfully take. Courts have allowed such officers or bodies lacking either *de jure* or *de facto* authority to act only as necessary to avoid "chaos and confusion" and to allow the state to continue functioning. *See, e.g.*, *Dawson v. Bomar*, 322 F.2d 445, 447

(6th Cir. 1963); *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W.2d 40 (1956), *appeal dismissed*, 352 U.S. 920 (1956).

In placing constitutional amendments on the ballot, the General Assembly was not acting to avoid chaos and confusion. It was seeking to further entrench its illegally gained power on the eve of remedial elections. It was seeking to lock-in its policy preferences for generations to come before new elections could "return to the people of North Carolina their sovereignty." *Covington II*, 270 F. Supp. 3d at 883.

The trial court correctly interpreted the Constitution and the weight of case law. The trial court's Order was limited in scope—applying only to the constitutional amendment process, and not to other legislation. It was limited in time—applying only from the United States Supreme Court's final merits ruling in *Covington v. North Carolina* in June 2017, until January 2019 when a new General Assembly was elected and seated under remedial districts. And it was limited in reach—subject to a finding that voiding these two amendments would not unleash "chaos and confusion" in our State. R. at 192. This Court should affirm that sound ruling and uphold the

tenet of popular sovereignty that undergirds and guarantees the democratic foundation of this State.

II. The Question before the Court is not a Political Question, but a Justiciable Constitutional Question.

The political question doctrine applies to those controversies that "revolve around *policy choices* and *value determinations*," not to the interpretation of the Constitution itself. *Cooper v. Berger*, 370 N.C. 392, 408, 809 S.E.2d 98, 107 (2018) (emphasis added) (citing *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)). Here, the question relates to whether a General Assembly that lacks the requisite claim to popular sovereignty can propose constitutional amendments. It is not a debate over the substance of the amendments themselves. This question is justiciable and can be decided by North Carolina courts.

a) Defendants incorrectly cite to inapposite case law to suggest this case is nonjusticiable.

In an attempt to evade the weight of state law and the mandates of our Constitution, Defendants present this Court with a line of cases from a time when apportionment and redistricting were nonjusticiable, political questions. Def. Br. at 14-17. Defendants rely on these inapposite cases to argue that the present question—the constitutional

limits of an illegally constituted legislature—has already been taken up by previous courts and deemed nonjusticiable. But it has not.

Defendants focus primarily on *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939). In *Leonard*, a plaintiff sought a declaration that the General Assembly was not properly apportioned as part of his effort to evade a retail sales tax of $3.13 that had been levied upon him. *Id.* at 324. The weight of Court's opinion focused on the question as to whether the sales tax was arbitrary and discriminatory, and therefore unconstitutional. In closing, however, the court briefly rejected the apportionment aspect of the plaintiff's claim as a non-justiciable political question. *Id.*

At the time *Leonard* was decided, however, the question of apportionment was considered a non-justiciable issue—a fact the plaintiff himself conceded in his brief. It is no surprise, therefore, that the North Carolina Supreme Court determined that both the question of apportionment—and the related consequences of malapportionment—were non-justiciable political questions. Defendants' references to cases from other state courts from this no-longer relevant period in redistricting jurisprudence, *see* Def. Br. at 14-

16, fail to assist this Court for the same reason that *Leonard* is inapposite.

Redistricting law has, of course, changed. In 1962, the United States Supreme Court ruled that challenges to the apportionment of a state legislature under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution were justiciable, and therefore courts had a role in adjudging whether the composition of a legislature was legal. *Baker v. Carr,* 369 U.S. 186, 197–98 (1962). The North Carolina Supreme Court followed suit in *Woodard v. Carteret County*, 270 N.C. 55, 62 (1967) (holding that an equal protection challenge to the apportionment of a board of county commissioners was justiciable), and *Stephenson v. Bartlett*, 355 N.C. 354, 386 (2002) (affirming the trial court's decision that the 2001 state legislative redistricting plans violated the North Carolina Constitution).

Subsequently, there have been decades of cases that have taken up the threshold question upon which the *Leonard* court based its ruling, including *Covington*. *Covington v. North Carolina*, 581 U.S. ——, 137 S. Ct. 2211 (June 5, 2017) (per curiam).

Defendants state, incorrectly, that "the *Leonard* court did not hold that a constitutional challenge to redistricting or apportionment itself was a political question." Def. Br. at 15. But that is *exactly* what the *Leonard* court did. The North Carolina Supreme Court concluded that the question of whether "the General Assembly of 1937 was not properly constituted because no reapportionment was made" was "a political one, and there is nothing the courts can do about it." *Leonard,* 216 N.C. 89, 3 S.E.2d at 324 (citing to cases stating that apportionment questions are non-justiciable).

The question of the justiciability of the apportionment and the consequences that flow from malapportionment are inextricably interlinked, as noted in the Illinois case relied on by both the *Leonard* court and Defendants. *People ex rel. Fergus v. Blackwell,* 342 Ill. 223, 225, 173 N.E. 750, 751 (1930) ("What this court cannot do directly in this respect it cannot do indirectly."). Thus, where the issue of redistricting was not justiciable, courts necessarily lacked the authority to address related questions regarding the limits of power that should be accorded illegally-constituted legislative bodies.

Indeed, as discussed above, where elected officials and legislative bodies have been found to be in office illegally via means *other than apportionment*, North Carolina courts have already recognized they have jurisdiction to look into the secondary question that is at the heart of this case: the limitations of power accorded such illegally elected bodies. *See, e.g.*, *Starbuck*, 252 N.C. at 176 (municipal corporation); *Edwards*, 235 N.C. at 345 (school board).

The question before this Court is not, as it was in *Leonard*, whether the General Assembly was constitutionally comprised. We already know the answer: it was not. Instead, the question before this Court is the secondary question: is there any limit on the acts of a General Assembly that has been found to be the product of a widespread illegal racial gerrymander? The trial court correctly ruled that under these circumstances, proposing constitutional amendments exceeded those limits.

b) There are manageable standards to determine when an unconstitutionally-constituted legislature may act.

Defendants further erroneously claim that this Court should find the issue in this case nonjusticiable because no manageable standards exist to guide application of the constitutional principle of sovereignty of

the people. But the NC NAACP asks only that the Court determine the narrow question of whether an illegally constituted General Assembly has power to amend our Constitution.

The matter before this Court is focused on the limited issue of the constitutional amendment process and the provisions of the North Carolina Constitution that speak to its amendment: Article XIII § 4, which dictates that the Constitution may only be amended by a proposal enacted by three-fifths of the people's duly and legally elected representatives before it can be put before the electorate for a statewide vote; and Article I § 3, which prescribes that the Constitution may only be changed by the people. The trial court's order was equally focused on this narrow concern.

Furthermore, the legal question at issue in this case is strictly bound by time—it challenges the power of the legislative Defendants only from the moment the United States Supreme Court issued its final ruling in *Covington* to the time that a new legislature was elected from remedial districts. As discussed above, this is the time period in which it was known to the public that the General Assembly lacked

constitutional legitimacy, and thus could not be considered a *de facto* legislature.

Finally, as the trial court explicitly noted, any finding that the General Assembly was not empowered to act is also subject to the limitation that judicial relief invalidating an illegal act would not cause "chaos and confusion." As noted above, this doctrine has long provided a limiting factor to challenges brought against the acts of illegally-elected officers and governing bodies.

Defendants raise the specter of other separate challenges that are not before the court—asking, for example, whether a legislative veto that was overturned by an unconstitutional supermajority would also be subject to challenge.[3] There are significant differences between the effect of a constitutional amendment and the effect of a legislative veto override. While the effect of a legislative veto override can be easily undone with the simple majority vote required by regular legislation,

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[3] Defendants cite to the affidavit submitted in a different case by an attorney at the same law firm as some of Plaintiff's counsel in this case, in which that attorney noted a more expansive theory as to what acts of an illegally constituted body could be deemed lawful. Def. Br. App. at 17. The affidavit, which was not submitted by Plaintiff in this case, and which involved additional legal arguments and different constitutional provisions than those involved here, has no bearing on any matter before this Court.

undoing a change to our state's Constitution is far harder, and would requires a three-fifths supermajority in both houses to rectify.

More importantly, the question of legislative veto overrides is simply not before the Court. And if such a question were to come before the Court in the future, it would be subject to the same limiting principle of "chaos and confusion" that bound the trial court's ruling on this question. R. at 192.

But this Court need not define the limits of the doctrine of avoiding chaos and confusion to resolve the present case. At no point in this litigation, including in their latest brief, have Defendants articulated how voiding the Voter ID or Tax Cap Amendments would lead to chaos. And that is because they cannot. Defendants' decision to propose constitutional amendments even after the *Covington* court had ruled that they were operating under a cloud of constitutional illegitimacy is far outside the bounds of any reasonable interpretation of what action is required to run the day-to-day affairs of the state.

c) The judiciary has an essential role in protecting our constitution and popular sovereignty.

This Court should reject Defendants' argument that to adjudicate this case would be to "demonstrate a lack of respect for the coordinate

branch of government." Def. Br. at 22. It is well established in North Carolina that the judiciary has an essential role in protecting the integrity of our state Constitution: "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *Corum v. Univ. of N.C. Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992).

Thus, the proper meaning, construction, and application of the state constitutional provisions regulating the amendment process can only be answered with finality by the state Supreme Court. *See Stephenson*, 355 N.C. 354 at 362 ("'issues concerning the proper construction and application of ... the Constitution of North Carolina can ... be answered with finality [only] by this Court'") (omissions and alteration in original) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989)). This judicial role is enshrined in the constitutional provision that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

In recent years, North Carolina has repeatedly found itself in the midst of legal disputes centered around these fundamental concepts. Over the past decade, the North Carolina General Assembly has embarked on a campaign of voter disenfranchisement and wide-ranging attempts to entrench illegally-gained power. To do so, it has pushed against the bounds of our state and federal constitutions over and over. In response, time and again our courts have been called in to check these abuses, to protect our citizens' right to vote, to safeguard full and fair representation, and to ensure that the fundamental principles of representative democracy and a government that is derived from the will of the people is not lost.[4]

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[4] Indeed, over the past decade the General Assembly has enacted, and continues to enact, voting- and election-related legislation that has been struck down by state and federal courts as unconstitutional or violative of law. *See, e.g.*, *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214–15 (4th Cir. 2016), *cert. denied*, —— U.S. ——, 137 S. Ct. 1399, 198 L. Ed. 2d 220 (2017) (mem.); *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 352 (4th Cir. 2016); Order, *Poindexter v. Strach*, No. 5:18-CV-366, 324 F. Supp. 3d 625, 2018 WL 4016306 (E.D.N.C. Aug. 22, 2018), ECF No. 22 (holding that statute retroactively removing candidates from the ballot who were qualified and previously had been approved to appear on the ballot likely violated the candidates' rights under the First and Fourteenth Amendments); *N.C. State Conference of the NAACP v. Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16-CV-1274, 2018 WL 3748172, at *12–13 (M.D.N.C. Aug. 7, 2018) (holding that state statute authorizing individual voters to challenge registrations of other voters on change-of-residency grounds violated National Voter Registration Act); *Greensboro v. Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 951 (M.D.N.C. 2017).

Just last year, a three-judge panel of the Wake County Superior Court in this case ruled on issues of when and how our state Constitution can be amended, a ruling this Court and the North Carolina Supreme Court left intact on appeal. R. at 61. Defendants also argued in that instance that the question regarding misleading, vague, and incomplete ballot questions was a political one, a position rightly rejected by the three-judge panel. *Id*.

Moreover, our courts play an important role in ensuring that popular sovereignty remains unbroken. As our Supreme Court has noted, "[o]ur government is founded on the consent of the governed. A free ballot and a fair count must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot." *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746, 747 (1937). As such, the North Carolina Constitution "should be interpreted so as to carry out the general principles of the government and not defeat them." *Jenkins v. State Bd. of Elections of N.C.*, 180 N.C. 169, 104 S.E. 346, 349 (1920).

There can be no more important role for our courts than safeguarding both our Constitution, and our system of representative democracy, both of which are at stake in this case.

III. Defendants' Reliance on Federal Case Law is Unavailing.

All parties agree that the question before this Court is a matter of state law. Def. Br. at 13. Defendants nevertheless cite a litany of federal cases that are neither controlling nor relevant. *See id.* at 24-26, (citing *Baker v. Carr,* 369 U.S. 186 (1962) (appeal from U.S. District Court for the Middle District of Tennessee, interpreting the Fourteenth Amendment of the U.S. Constitution); *Ryder v. United States,* 515 U.S. 177, 183 (1995) (appeal from United States Court of Military Appeals, interpreting Article 2 of the United States Constitution); *Buckley v. Valeo,* 424 U.S. 1 (1976) (appeal from United States Court of Appeals for the District of Columbia, interpreting Federal Election Campaign Act and various provisions of the United States Constitution); *Ryan v. Tinsley*, 316 F.2d 430 (10th Cir. 1963) (habeas appeal discussing criminal statute); and *Martin v. Henderson,* 289 F. Supp. 411 (E.D. Tenn. 1967) (habeas case discussing criminal statute)). All of these are

federal cases interpreting federal law, rather than state cases interpreting the North Carolina Constitution.

Furthermore, these cases simply stand for the proposition that *some* acts of illegally constituted bodies *may* still be permitted to stand to avoid chaos and confusion—a proposition that is consistent with Plaintiff's position. For example, in *Baker v. Carr*, the United States Supreme Court condoned the proposition that a malapportioned legislature may be permitted to act, and specifically may be permitted to reapportion itself. 369 U.S. 186 (1962). The NC NAACP does not disagree. As discussed above, even an unlawfully constituted legislature may be authorized to take certain actions to avoid chaos and confusion, including, for example, voting to pass new maps to correct an illegal racial gerrymander.

The trial court's ruling, moreover, does not extend to any acts taken by the General Assembly *before* the United States Supreme Court affirmed the district court's decision in *Covington*. R. at 192. Thus, any cases cited by Defendants that deal with the question of whether *past* acts of a subsequently-invalidated body are lawful are also irrelevant. *See* Def. Br. at 17 (citing *Buckley*, 424 U.S. at 78 (striking down

appointments to the Federal Election Commission as unconstitutional but holding that "[t]he past acts of the Commission are . . . accorded de facto validity")); *Everglades Drainage League v. Napolean B. Broward Drainage Dist.*, 253 F. 246, 253 (S.D. Fla. 1918) (explaining that the legislature that passed the challenged statute "was the Legislature de facto," thus its acts were binding even if it had not been correctly apportioned); *cf. Ryder*, 515 U.S. at 184 (declining to apply the *de facto* officer doctrine where the defendant challenged as unconstitutional the appointment of the judges to the Coast Guard Court of Military Review in his case). Such cases simply have no bearing here.

IV. Defendants Mispresent the *Covington* Court's Ruling on Remedies as Sanctioning their Illegal Conduct.

Defendants suggest that by failing to order a special election, the federal court in *Covington* blessed the General Assembly with unlimited power, including the power to propose amendments to the Constitution. But this misstates the *Covington* court's ruling. It is true that the court reluctantly permitted a delay before new elections—noting that while new elections under remedial districts were needed to restore representative democracy to North Carolina, ultimately there was too much risk that rushing those elections would fail to return sovereignty

to the people of our state.[5] *Covington II*, 270 F. Supp. 3d at 901–02. In that very same opinion, however, as Defendants acknowledge, the court noted that the limitations of power on the legislative body in the interim was not a question the federal court could decide, but rather an "unsettled question of state law." *Id.* at 901.

And, while Defendants argue that "there is nothing to suggest that our State Constitution requires a more invasive and disruptive remedy than does the Federal Constitution," Def. Br. at 33, the United States Supreme Court has said otherwise. *See, e.g.*, *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008) ("the remedy a state court chooses to provide its citizens for violations of the federal Constitution is primarily a question of state law. Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" (quoting *Am. Trucking Assns., Inc. v. Smith,* 496 U.S. 167, 178-79 (1990) (plurality opinion)).

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[5] In determining whether a special election should be ordered, the *Covington* court wrestled with striking the same balance between the fundamental importance of popular sovereignty and the need for orderly government that the trial court applied in the present case. *Covington II*, 270 F. Supp. 3d at 902.

Here, the trial court determined that there are consequences to illegal actions. The trial court found that, while an unconstitutionally constituted General Assembly may inevitably have to continue to govern for a time until free and fair elections can be held, there are limitations to the powers of that body. Such powers do not extend to rewriting the North Carolina Constitution.

V. The Effect of the Widespread Racial Gerrymander was not Cured by Popular Vote.

Defendants suggest that popular ratification of the challenged constitutional amendments by a majority vote somehow cured the defective amendments of their illegal foundation.[6] Def. Br. at 19-20. It does not. Our Constitution has a two-step process for amendment. The later ratification by ballot cannot proceed without the primary requirement that a three-fifths supermajority of both houses reach

[6] The weight Defendants give the popular vote is further undermined by the arguments they made during the preliminary injunction phase of this case, in which they acknowledged that a ruling that the amendments were unlawfully proposed by the General Assembly could result in invalidating those amendments, even after ratification by the voters. In arguing against preliminary injunctive relief, Defendants argued: "Should Plaintiffs prevail on their challenge before the November election, then any votes cast for the challenged amendment simply would not count. And, if this lawsuit is not resolved before the November election and the Proposed Amendments are adopted by North Carolina voters, the Proposed Amendments could be *deemed invalid*." Defs.' Mem. in Opp. to Mots. for TRO and Prelim. Inj. (filed Aug. 13, 2018) at p. 19 (emphasis added).

consensus on any proposed constitutional amendment.

This strict two-step process has governed constitutional amendment in our State for almost two centuries. In their authoritative treatise on the North Carolina Constitution, Justice Paul Newby and Professor John Orth refer to the "awesome power" of constitutional amendment, and note that the requirement that a three-fifths supermajority of both houses of the General Assembly must agree to any amendment is one that has been in place for as long as there has been a mechanism for constitutional amendment[7]—an unbroken history that makes clear that the founders of our democracy intended amending the constitution to be a demanding, representative, and considered action, and, therefore, necessarily difficult.[8]

Defendants, as they must, acknowledge the *Covington* ruling.

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[7] John V. Orth & Paul M. Newby, *The North Carolina State Constitution* 201 (Oxford Commentaries on the State Constitutions of the United States) (2d ed. 2013).

[8] This intent has been adhered to and reinforced over our history. For example, the supermajority requirement to call a constitutional convention was debated and set in 1835 and is even more stringent, requiring a two-thirds majority of legislators to call for a convention.

Def. Br. at 8. They recognize the federal courts have found that Defendants' prior district maps diluted the political voice of African-American voters on a massive scale. *Id.* at 12. As such, by inference, they acknowledge that the supermajority that placed constitutional amendments on the ballot was one that the courts had found to be both illegal and unrepresentative. *See id.*

Permitting the use of an unrepresentative, unconstitutionally-elected supermajority to meet the critical first step in the awesome constitutional amendment process would entirely undermine the heightened safeguard that ensures that constitutional amendments are representative of the people's will.[9] Defendants' suggestion that popular ratification of a proposed constitutional amendment is, by

[9] Despite Defendants' suggestion to the contrary, Def. Br. at 29, in North Carolina a General Assembly that has been adjudged by the courts to be gerrymandered has never before placed constitutional amendments on the ballot. N.C. Session Laws 920 and 933, referenced by Defendants, were placed on the ballot *after* constitutional districts had been drawn and new elections had taken place.

On June 30, 1986, the U.S. Supreme Court held that the 1982 North Carolina legislative redistricting plan violated Section 2 of the Voting Rights Act of 1965. *Thornburg v. Gingles*, 478 U.S. 30, 42 (1986). Prior to the Supreme Court's ruling, however, under the lower court's order, *Gingles v. Edmisten*, 590 F. Supp. 345, 376 (E.D.N.C. 1984), the General Assembly redrew the offending districts on March 8, 1984. *See* N.C. Session Law 1983-1-es2 (3/8/1984); N.C. Session Law 1983-4-es2 (3/8/1984); N.C. Session Law 1983-5-es2 (3/8/1984); N.C. Session Law 1983-6-es2 (3/8/1984). These revised maps were used for the 1984 primary and general elections, prior to the passage of Session Laws 920 and 933 in July 1986.

itself, sufficient to meet the constitutional requirements for amendment would essentially write out of the Constitution the critical three-fifths threshold requirement.[10]

At the time it proposed these amendments, the North Carolina General Assembly was an illegal body that did not possess the requisite claim to popular sovereignty. The three-fifths supermajority required as a first step was obtained only via illegal means, because it drew directly from legislative districts tainted by an unconstitutional racial gerrymander. Later ratification of the proposed amendment by a simple majority of the popular vote could not save this fundamental constitutional deficiency.

As Justice Marshall noted in *Marbury v. Madison*, "[t]he constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it." 5 U.S. 137, 177 (1803). In North Carolina our Constitution has always

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[10] The three-fifths threshold requirement also offers an important protection to our State's minority groups. There are many examples outside of the constitutional amendment context of where "direct democracy" and a simple majority vote has been employed to disadvantage minority groups. *See* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257–60 (1997).

been a "superior paramount law." This Court cannot allow Defendants to turn it into just an "ordinary legislative act." *Id.*

CONCLUSION

The trial court's decision should be affirmed.

Respectfully submitted this 12th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellee certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

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